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## Arizona's Immigration Law at the Supreme Court

On Wednesday, April 25, the Supreme Court will hear oral arguments on several provisions of Arizona's immigration law (S.B. 1070). Former Solicitor General Paul Clement represents Arizona. Justice Kagan, who worked on the issue while with the Department of Justice (DOJ), has recused herself, creating the possibility of a 4-4 split.

### Overview

Arizona enacted S.B. 1070 in 2010 and, in short time, the law drew sharp criticism and a legal challenge by DOJ. The U.S. District Court for the District of Arizona enjoined four provisions of the law it found to be preempted by federal immigration law. The Ninth Circuit Court of Appeals affirmed the decision.

Under the Supremacy Clause of the Constitution, federal law takes precedence over state and local law. When state laws conflict with federal law or when a state legislates in an area in which Congress has enacted a regulatory scheme intended to "occupy" the legislative field, the state laws are subordinated.

Despite the federal government's almost exclusive power to regulate immigration, it has long encouraged the "cooperation" of state and local officials in enforcement efforts. In the case before the Court, Arizona argues that S.B. 1070 is merely an effort to increase cooperative enforcement. DOJ, on the other hand, argues that state/federal cooperation is narrowly defined and requires state and local officers to work within federal parameters. Arizona's law, the Administration argues, exceeds those parameters and conflicts with enforcement priorities set by the Executive Branch.

### The Four Provisions of S.B. 1070 in Question

The Court will consider four key provisions of S.B. 1070 to assess whether the law conflicts with federal immigration laws such that it is deemed precluded.

**Provision #1:** *Whether the federal government's prioritization for removing only criminal aliens should be given primacy over requirements placed on law enforcement under S.B. 1070.*

Federal law permits and encourages the cooperation of state and local officials in investigating the status of suspected illegal aliens. Arizona's immigration law makes this cooperation mandatory, requiring law enforcement officers to determine the immigration status of *any* person they have lawfully stopped when there is a reasonable suspicion that the person is an illegal alien. The Administration contends that Arizona's law conflicts with federal enforcement priorities because it requires officers to pursue the removal of *all* illegal aliens rather than the *criminal* aliens prioritized by the Executive Branch.

**Provision #2:** *Whether Congress has passed a comprehensive alien registration program that precludes state legislation criminalizing violations of the federal program.*

Arizona's immigration law criminalizes violations of federal immigration registration requirements. Generally, states are permitted to punish conduct that is prohibited by federal law unless Congress has passed comprehensive legislation in the area. The Administration argues that Congress has passed such a comprehensive alien registration program that precludes Arizona's effort to criminalize violations of the federal laws.

**Provision #3:** *Whether available penalties under federal immigration law indicate an intentional policy choice by Congress such that any state laws imposing additional penalties are preempted.*

Federal immigration law imposes criminal penalties on the *employers* of illegal immigrants while only imposing civil consequences, such as removal, on illegal immigrant *employees*. As a result, employees are largely unregulated. Arizona's law addresses this disparity by imposing criminal penalties on illegal aliens who apply for, solicit, or perform work in the state. The question before the Court is whether the disparity between employers and employees in federal law was intended to balance competing interests such that it would preclude state action in the area, or whether it was intended to permit states to regulate employees.

Last year, the Supreme Court considered another Arizona law regulating the employment of immigrants. The law revoked the licenses of businesses found to knowingly employ illegal aliens. In *Chamber of Commerce v. Whiting*, the Court held that federal immigration law did not preempt this provision because the state law fell within a narrow statutory exception in federal law. Given the narrow statutory exception, it is unclear if the holding in *Whiting* will be determinative in this case.

**Provision #4:** *Whether permitting state law enforcement officers to arrest removable aliens without a warrant conflicts with the Executive Branch's exclusive power over deportation.* Arizona law permits law enforcement officers to make warrantless arrests for certain crimes. One section of S.B. 1070 provides an additional basis for such arrests: it allows officers to make a warrantless arrest of any person who "has committed any public offense that makes the person removable from the United States." The Ninth Circuit held that this law was preempted because it permitted the warrantless arrest of a person based on an officer's determination of the person's removability. DOJ argues that such determinations are solely the province of federal authorities. However, there is broad disagreement on what the statute actually authorizes. Since state Supreme Courts are the final arbiter of the meaning of state law, the United States Supreme Court may send that question back to the Arizona courts.